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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MELANIE C., Plaintiff and Appellant, v. COUNTY OF SAN DIEGO, Defendant and Respondent.	D074204 (Super. Ct. No. 37-2018-00002928-CU-PT-CTL)

APPEAL from an order of the Superior Court of San Diego County, Laura H. Parsky, Judge. Affirmed.

Lanzone Morgan, Jomo K. Stewart, Anthony C. Lanzone and Joseph M. Szilagyi for Plaintiff and Appellant.

Thomas E. Montgomery, County Counsel, and Kate D. Jones, Deputy County Counsel, for Defendant and Respondent.

Melanie C. appeals the trial court's order denying her petition for late claim relief. Principally, she argues that her failure to file a timely claim against the County of San

Diego, which alleges a deficient foster care process concerning 13-year-old John Doe,[1] constituted excusable neglect. According to Melanie, she was prevented from filing a claim by implicit threats made by the county suggesting that if she brought a claim relating to the foster process involving John, the county would block her adoption of Jane Doe, John's sister.

Having reviewed the record and applicable law, we do not agree with Melanie's contentions. As the trial court found, Melanie had sufficient notice of the relevant issues with ample time to initiate litigation and failed to do so. Furthermore, she has provided no evidence substantiating her speculation about the alleged threats concerning her adoption of John's sister. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*

In March 2015, Melanie began fostering two children whom she intended to adopt—John and his younger sister Jane. At the time, Melanie already had three adoptive sons. Shortly after entering the home, John began acting out sexually and behaviorally by periodically smearing feces on the walls at school and at home, masturbating in common areas of the home, and masturbating the family dog. Melanie notified John's social workers about his conduct, and in September 2015 raised concerns with them about adopting John.

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[1] To safeguard privacy we refer to this individual as John Doe and to his sister as Jane Doe, intending no disrespect.

In August 2016, Melanie was told by one of her sons that John raped another of her sons and that he had been in the room when it happened. She reported the incident to John's social workers. She also became aware that in October 2016, John molested one of her sons, and she again immediately reported the incident. In January 2017, her seven year old told her that John had molested him. That night, she locked herself, Jane, and her three sons in her bedroom due to her fear of John. She drove John and the other children to school the next morning and notified law enforcement. John did not return to Melanie's home.

According to Melanie, the county's "adoption social workers asked [her] several times if [she] intended to bring a legal action," including while at the police station to report the final incident in January 2017. Before she filed her claim with the county, she "did [G]oogle [her] rights. However, [she] felt that if [she] hired a lawyer that they would remove [Jane]."

B. *Procedural Background*

On October 3, 2017, some eight months after John last resided in her home, Melanie submitted a claim to the County of San Diego based on the preceding facts. The following week, the county denied her claim as untimely. She then filed with the county an application for leave to present a late claim, but it was denied on the grounds that she had not presented her claim within six months after accrual and her failure to file was not excused by Government Code section 911.6.[2]

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2 All statutory references are to the Government Code unless otherwise indicated.

Melanie then filed a petition in San Diego County Superior Court seeking late claim relief under section 946.6. In support, she attached her own declaration and that of her counsel. She also filed a second declaration when she submitted her reply. Following a hearing on March 22, 2018, the court held that Melanie had failed to show mistake, inadvertence, surprise, or excusable neglect, and that there was no evidence that the specific actions of the county would constitute estoppel. Later that day, the trial court entered a minute order denying the petition and requesting the county submit a proposed order and judgment, which it did on April 9, 2018.

DISCUSSION

A. *Appealability*

As an initial matter, we address the county's argument that the relevant order is not appealable. In its opening brief, the county correctly noted that the minute order entered on March 22, 2018, was neither final nor appealable. That order directed the county to prepare and submit a written order and judgment and, while the county did submit a proposed order, a signed version was never filed. (See, e.g., *Barak v. The Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 658–659; *Davis v. Taliaferro* (1963) 218 Cal.App.2d 120, 123 ["The rule is settled that where a minute order directs that a written order be prepared, signed and filed, an appeal does not lie from the minute order but from the written order."].) Pursuant to rule 8.104(d)(2) of the California Rules of Court, however, this court can treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment. (See, e.g., *Hall v. Rockcliff Realtors* (2013) 215 Cal.App.4th

1134, 1138.) Following supplemental briefing on the issue in this court, the trial court granted judgment reflecting its intended ruling, as originally announced in its March 2018 minute order. Accordingly, we may review Melanie's appeal of the order denying her petition for late claim relief.

B. *Melanie's Arguments on Appeal*

Melanie raises three issues here. First, she argues that uncontradicted evidence established grounds for relief and shows the failure to file was the result of excusable neglect or, alternatively, that she may bring the claims under principles of equitable estoppel. Second, she contests the trial court's factual analysis and claims that limiting the scope of the analysis to Melanie's declarations was an abuse of discretion. Third, she argues that the court failed to rule on her accrual or delayed discovery arguments, and that it abused its discretion in denying her right to a jury's determination. We discuss each contention in turn.

1. *Melanie's Delay Did Not Result from Excusable Neglect*.

In a petition for late claim relief under section 946.6, the petitioner bears the burden of showing mistake, inadvertence, surprise, or excusable neglect by a preponderance of the evidence. (*Shaddox v. Melcher* (1969) 270 Cal.App.2d 598, 600–601.) We review a trial court's order deciding such a petition for abuse of discretion, taking care to consider denials in light of the policy favoring trial on the merits. (*Harrison v. County of Del Norte* (1985) 168 Cal.App.3d 1, 6–7.)

According to Melanie, uncontradicted evidence establishes that her failure to file resulted from excusable neglect. To the contrary, however, the evidence presented by

Melanie—consisting of two declarations from her and one from her counsel—demonstrates that by January 2017 she was aware that John had been experiencing behavioral challenges since shortly after entering her home and that he had sexually assaulted all three of her sons. That same month she was suffering emotional harm, including panic attacks, as a result of the incidents with John. But she waited more than nine months before filing a claim.

The nine-month delay, Melanie claims, is excusable because she had been implicitly threatened by the county. County social workers asked her multiple times whether she intended to bring a legal action, and she therefore "felt that if [she] hired a lawyer that they would remove [Jane]." But merely asking Melanie whether she intended to bring a legal action, under these circumstances, is too benign, insubstantial, and nonspecific to rise to the level of a threat, and a reasonable person would not understand it to mean that the county was using Jane's adoption as leverage to prevent Melanie from filing her claim.[3]

Alternatively, Melanie raises equitable estoppel, claiming that the petition should be granted because the county's own actions delayed her claim. (See *John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 445.) On this point, Melanie again offers that

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3 We note that Melanie suggests at several points in her briefs that she only became aware of the "pertinent factual basis" for her claims after delinquency charges were brought against John in September 2017. But she provided no evidence to support this claim. She noted in her declaration that she "was informed the District Attorney filed criminal charges against [John] for the molestation of my boys," but such an assertion is not evidence that she failed until that point to discover a fact necessary to her claims.

the county's implicit threats constitute actions delaying her claim. For the same reasons discussed *ante*, however, the evidence is insufficient. The only evidence presented of the county's alleged actions, i.e., asking on multiple occasions whether Melanie intended to bring a legal claim, fails to demonstrate that any action taken by the county delayed her claim or was designed or intended to interfere with her making one.

2. *The Court Did Not Abuse Its Discretion in Evaluating the Evidence*.

Melanie additionally argues that the court improperly limited its consideration of the evidence to the two declarations filed by Melanie. But those declarations, and the declaration of Melanie's counsel, were the only evidence properly before the court. At the hearing on the petition, the court appropriately afforded Melanie several opportunities to identify or submit additional evidence, but she failed to do so. Instead, counsel reiterated that "[Melanie] talked in her declaration that the social workers kept bringing the issue of whether or not she was going to bring up a legal claim, and she took that as a threat . . . ." Apart from this alleged "implicit threat," Melanie identified no other evidence during the hearing or in her briefing. Accordingly, the trial court did not disregard any evidence or limit its evaluation of the evidence in any way, nor did it abuse its discretion in relying on the competent evidence before it.

3. *Accrual Determination*

Melanie offers two arguments related to the trial court's determination of the accrual date of her claims against the county. First, without citing any evidence, she contends that the court abused its discretion in "not rul[ing] on [her] Delayed Discovery or Continuous Accrual arguments." But as plainly recorded in the transcript of the

hearing as well as in the order, the trial court heard, considered, and ruled on Melanie's arguments regarding delayed discovery and continuous accrual.

Second, Melanie argues she was deprived of her right to a jury's determination on accrual. In a section 946.6 proceeding, however, "the petition for relief necessarily places in issue the accrual of the cause of action, which question is then resolved in a nonjury proceeding." (*Reyes v. County of Los Angeles* (1988) 197 Cal.App.3d 584, 595, citing *Gurrola v. Los Angeles* (1984) 153 Cal.App.3d 145, 153.) And because the right to a jury's factfinding "does not extend to a claim-relief proceeding . . . , the trial court may make factual determinations relating . . . to timeliness of a claim . . . ." (*Santee v. Santa Clara County Office of Educ.* (1990) 220 Cal.App.3d 702, 711–712, citations omitted; cf. *Ngo v. County of Los Angeles* (1989) 207 Cal.App.3d 946, 950–951 [indicating that the trial court lacks power to determine an issue of timely filing because the claim-relief proceeding by definition assumes a claim was not timely filed].)

Without addressing the case law in opposition to her argument, Melanie primarily relies on *Dujardin v. Ventura County Gen. Hosp.* (1977) 69 Cal.App.3d 350. In her opening brief, she misquoted the opinion as stating that " '[b]ecause the question of belated discovery depends on the facts and circumstances surrounding the negligent act and the subsequent events leading to discovery, the issue is one of fact for a jury to decide.' " In response, the county pointed out that Melanie omitted a few key words, and that the opinion in fact reads, "the issue is *ordinarily* one of fact for a *court or* jury to decide." (*Id.* at p. 356, italics added.) Melanie failed to correct the quote, and instead emphasized the erroneous language in bold in her reply brief. Melanie also failed to

address how this case, which resolved an appeal of a dismissal of a complaint, applies to the circumstances here.

Because we reject Melanie's argument that she had a right to a jury's determination on accrual, we decline to address the county's alternative argument that Melanie waived any such right in failing to demand a jury trial in her petition, reply, at any other point before the hearing was set, or during the hearing itself.

DISPOSITION

The order is affirmed.

DATO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.